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INDEX.

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	1
COUNTERSTATEMENT OF THE CASE	2
ARGUMENT	8
CONCLUSION	12

TABLE OF CITATIONS.

Cases:	Page
Augspurger v. Brotherhood of Locomotive Engineers, 510 F. 2d 853 (8th Cir. 1975)	9
Bruen v. Electrical Workers Local 492, 425 F. 2d 190 (3d Cir. 1970)	9
Ford Motor Co. v. Huffman, 345 U. S. 330 (1953)	9
Hiatt v. New York Central R. R., 444 F. 2d 1397 (7th Cir. 1971)	9
Humphrey v. Moore, 375 U. S. 335 (1964)	9
Jones v. Trans World Airlines, 495 F. 2d 490 (2d Cir. 1974)	11
Lauturner v. Burlington Northern, Inc., 501 F. 2d 593 (9th Cir. 1974), cert. denied, 419 U. S. 1109 (1975)	9
NLRB v. Whiting Milk Corp., 342 F. 2d 8 (1st Cir. 1965) ...	9
Northeast Master Executive Council v. CAB, 506 F. 2d 97 (D. C. Cir. 1974), cert. denied, 419 U. S. 1110 (1975) ..	9
Price v. International Brotherhood of Teamsters, 457 F. 2d 605 (3d Cir. 1972)	9
Vaca v. Sipes, 386 U. S. 171 (1967)	9
Miscellaneous:	
Federal Rules of Civil Procedure:	
Rule 23(b)(2)	2
Rule 54(b)	6
1964 MILA Supplement	3, et seq.
28 U. S. C. § 1291	6
28 U. S. C. § 1292(b)	7
Railway Labor Act, 42 U. S. C. §§ 151 et seq.	1, 2

**COUNTERSTATEMENT OF QUESTION
PRESENTED.**

Should this Court grant certiorari to consider whether Trans World Airlines, Inc. (TWA) is liable under the Railway Labor Act, 45 U. S. C. § 152 to employees alleging a breach of their Union's duty of fair representation, where the District Court found, and the Circuit Court concurred, that there were legitimate considerations underlying the difference in seniority status of employees under the same collective bargaining agreement and that TWA neither had any part in nor knew about misrepresentations by the Union to TWA employees at Kennedy Space Center about Union efforts to achieve retroactive system seniority?

COUNTERSTATEMENT OF THE CASE.

This is a Rule 23(b)(2) class action in which plaintiffs are a group of over 300 present Trans World Airlines, Inc. (TWA) employees who were initially hired by TWA at Kennedy Space Center (KSC) during TWA's 1964 through 1971 operation of the space facility. They sued TWA, the International Association of Machinists and Aerospace Workers (IAM), (their exclusive collective bargaining representative), District Lodge 142, and Local Lodge 1776 (the Philadelphia Local where Deboles, the class representative, has been a member since his transfer to Philadelphia), alleging violations of certain provisions of the Railway Labor Act, 42 U. S. C. §§ 151 *et seq.* and a violation of the Union's duty of fair representation. They base their claims on the difference in seniority status accorded KSC employees, as opposed to that accorded TWA employees in the rest of the system, and on alleged misrepresentations made by the Union to TWA employees at KSC about the Union's effort to obtain retroactive system seniority for KSC employees.

In 1963 TWA submitted a bid to the National Aeronautics and Space Administration (NASA) to operate the Florida space facility originally known as the Merritt Island Launch Area and later renamed the Kennedy Space Center. TWA was awarded the contract in 1964. TWA recognized the need for a stable labor force at KSC because of the integral importance of KSC to the national space program. At the time TWA already had a stable relationship with the IAM, which had been certified by the National Mediation Board under the provisions of the Railway Labor Act as the exclusive collective bargaining representative for TWA employees in the job classifications "Mechanics and Related Employees". TWA further believed that labor stability at KSC could be better ensured

if TWA's relations with its KSC employees were governed by the Railway Labor Act rather than the National Labor Relations Act. In addition, TWA wanted to avoid the jurisdictional disputes that had plagued its predecessor at the space installation. Thus, before beginning operation of the KSC facility TWA indicated to the IAM its desire to recognize the IAM as the bargaining representative at KSC.

Following ratification in January 1964 of the main collective bargaining agreement for TWA employees, TWA and the IAM negotiated a supplemental agreement covering KSC employees, the purpose of which was to maximize the desired stability of the KSC work force. TWA was particularly concerned about wholesale and seasonal "snowbird"¹ transfers from other stations, about the usability of the transferees' skills in light of the uniqueness of many of the job skills required at KSC, and about the disruptive effect which would result from displacement of KSC employees. The 1964 MILA Supplement, thus, provided that new employees hired at KSC would not be placed on the system seniority² roster and would not be permitted bid or displacement rights to other system locations. It provided, in addition, that system employees who sought to transfer to KSC could not use their system seniority for any purpose at KSC, and were placed at the bottom of the KSC seniority roster. Although system em-

1. A "snowbird" is one who uses his system seniority to transfer to Florida for the winter.

2. "System seniority" is national seniority by job classification whereby TWA employees are ranked on national seniority system rosters according to their length of service in the particular job classification regardless of the system location where they worked. System seniority gave TWA employees the right to bid for vacancies at other system locations, to bump or displace employees with less classification seniority at other locations in the event of furlough, and the preferential rights to shift assignments and days off within their own system location.

employees who transferred to KSC continued to accrue system seniority while at KSC, they were required to remain at KSC for one year before they were eligible to bid out.

As a result of the rapid expansion of the TWA workforce at KSC, and the protection from "bidding in" by others elsewhere in the system,³ higher classifications and lead position slots were attained at KSC much more rapidly than in the TWA system generally. While seasonal layoffs were customary in the rest of the TWA system, KSC employees enjoyed unusual stability and growth as a result of the expansion of the space program because of this protection from "bidding in." The first layoff at the Space Center did not occur until August, 1969.

During negotiation of the 1966 collective bargaining agreement, KSC employees through their Local 773 submitted a proposal to remove the seniority restrictions from the MILA Supplement. When contract negotiations reached an impasse in July, 1966, TWA employees including Space Center employees, went on strike, and KSC was closed for a week. In response to the consideration by Congress, stemming from its concern about the space program, of legislation to impose binding arbitration, Union officials urged KSC employees to return to work while negotiations continued.

Under the terms negotiated for the 1966 Supplemental Agreement, KSC employees could bid for vacancies in the system on a preference basis, i.e., KSC employees would have no displacement rights but would be preferred over new hires at the system location, and system transferees to KSC who had been promoted or attained a lead

3. While employment grew from 300 to approximately 2,000 after TWA commenced operations at the Space Center on April 1, 1964, during the nearly 7 years of the TWA operation only 60 to 90 employees transferred to KSC from the system.

position while at KSC could bid back into the system only at the level at which they had left the system to go to KSC. KSC employees were advised by Gordon of District Lodge 142 that the Union had done the best it could to eliminate the seniority restrictions for KSC employees but that TWA had attached unacceptable conditions. Local 773 recommended ratification, and the 1966 contract was accepted by KSC employees.

At the 1968 opening of negotiations for the 1970 IAM-TWA agreement, both TWA and the IAM submitted proposals containing provisions for retroactive system seniority at KSC. During the course of the negotiations, TWA became concerned about the difficulty of melding job skills between KSC and the rest of the system, a prerequisite to the integration of KSC employees into system seniority. Ultimately an agreement was reached whereby job classifications at KSC were matched with many job classifications in the remainder of the system.

In late June or early July of 1969 TWA submitted a proposal to District Lodge 142 negotiators which would have given retroactive system seniority to KSC employees. A groundswell of opposition to retroactive system seniority for KSC employees appeared, evidenced by petitions generated by IAM members of Local Lodge 1650 in Kansas City and circulated throughout the TWA system. The negotiating committee concluded that the inclusion of such a provision in the contract might prevent ratification and the committee voted to remove the proposal from the bargaining table. However, the proposal was actually kept on the table until the last day or so of negotiations. Another proposal was offered by the Union in the final days of negotiations which provided that KSC employees would begin to accrue system seniority, and system employees would begin to accrue KSC seniority, as of the date of contract ratification.

TWA and the IAM reached final agreement on January 16, 1970, and the contract was submitted for ratification. In terms of its economic provisions and numerous work rule changes the contract was extremely beneficial to the Union.

District Lodge 142 Assistant Chairman James Fowler conducted the ratification meetings at the Space Center and advised the executive board of Local 773 and KSC employees that the Union had done the best it could to obtain retroactive system seniority but that TWA had attached unacceptable conditions. The executive board of the Local spoke neither for nor against the contract and the employees at KSC voted 714-69 in favor of ratification. Even if Fowler had disclosed that system opposition was the actual reason for the Union's failure to agree to the proposal of retroactive system seniority and even if all KSC employees had voted against ratification, the contract still would have been approved by a margin of 3 to 1.

The District Court concluded on the basis of this evidence, that there were legitimate considerations underlying the seniority differences embodied in the 1964 MILA Supplement and, therefore, the seniority distinctions in themselves were not a violation of the Union's duty of fair representation, but that the Union's misrepresentations constituted a breach of its duty of honest and fair representation. The District Court concluded, in addition, that the plaintiff's claim against TWA could not be sustained since there was no evidence that TWA was a party to the deception or even that it was in any way aware of the misrepresentations.

Pursuant to 28 U. S. C. § 1291, plaintiffs appealed the final judgment in favor of TWA entered by the District Court under Federal Rule of Civil Procedure 54(b). Both the plaintiff class and the defendant unions appealed from

the interlocutory order determining liability in favor of plaintiffs and against the defendant unions by permission of the Court of Appeals for the Third Circuit under 28 U. S. C. § 1292(b).

The Court of Appeals affirmed the District Court's rulings that TWA was not liable to the plaintiffs and that the seniority distinctions did not violate the Union's duty of fair representation. It reversed the District Court's finding that the Union's misrepresentations constituted a breach of the Union's duty of fair representation because plaintiffs had failed to show a "tangible injury proximately resulting" from the misrepresentation.

ARGUMENT.

The District Court below concluded, and the Court of Appeals concurred, that TWA had no liability to the plaintiffs in this action. The courts below found that TWA had no liability for the misrepresentations made by Union representatives to the Kennedy Space Center membership because TWA neither participated in nor even knew of the misrepresentations. The District Court also found, and the Court of Appeals affirmed, that there were significant considerations supporting the seniority differences contained in the collective bargaining agreements negotiated between TWA and the Union and, therefore, the mere differences did not constitute a breach of the Union's duty of fair representation. These decisions are amply supported by the evidence, are based upon substantial precedent, and are entirely consistent with other decisions by courts of appeals considering the validity of seniority distinctions between groups of employees governed by a single collective bargaining agreement. Plaintiffs' failure to address these well-founded conclusions of the courts below on the issue of TWA's liability and their proposal to postpone the presentation and discussion of the TWA liability until granted certiorari on the issue of the Union's liability⁴ demonstrate that they have no case against TWA worthy of this Court's consideration.

Both the Court of Appeals and the District Court rejected plaintiffs' theories that the seniority differences

4. Plaintiffs' sole reference to the consideration of TWA's liability is found in footnote 4 of their Petition where they state:

"We have not discussed TWA's liability for executing and enforcing the contracts. That liability is reached only upon a determination that the Union breached its duty in respect to the agreements themselves. We propose to argue issues related to TWA's liability if certiorari is granted. In connection with TWA's liability, see *Jones v. Trans World Airlines, Inc.*, 495 F. 2d 790 (2d Cir. 1974)."

contained in the 1964 TWA-IAM collective bargaining agreement were "arbitrary, discriminatory, or in bad faith," the standard set down by this Court in *Vaca v. Sipes*, 386 U. S. 171, 190 (1967), by which to determine whether a union's conduct violated its duty of fair representation. Following a comprehensive review of the line of decisions of this Court and others upholding the validity of seniority differences among employee groups governed by a single contract and according the union wide latitude in the exercise of its discretion subject to the requirements of good faith and honesty of purpose,⁵ the Court of Appeals concluded:

"... this court is persuaded, as was the court below, that the seniority distinctions in the instant case fall within the zone of reasonableness by which a union's conduct must be measured." Petitioners' Appendix at 44.

Both courts concluded that the seniority differences provided for under the collective bargaining agreements at the Space Center were the result of the recognition of pertinent differences between the Space Center operation and the remainder of the TWA system. The seniority differences were justified by TWA's desire for a stable workforce at KSC and its reasonable belief that differences in skills and the probability of "snowbird" transfers between the system and the Space Center would disrupt

5. *Ford Motor Co. v. Huffman*, 345 U. S. 330 (1953); *Humphrey v. Moore*, 375 U. S. 335 (1964); *Price v. International Brotherhood of Teamsters*, 457 F. 2d 605 (3d Cir. 1972); *Bruen v. Electrical Workers Local 492*, 425 F. 2d 190 (3d Cir. 1970); *NLRB v. Whiting Milk Corp.*, 342 F. 2d 8 (1st Cir. 1965); *Hiatt v. New York Central R. R.*, 444 F. 2d 1397 (7th Cir. 1971); *Augspurger v. Brotherhood of Locomotive Engineers*, 510 F. 2d 853 (8th Cir. 1975); *Lautner v. Burlington Northern, Inc.*, 501 F. 2d 593 (9th Cir. 1974), *cert. denied*, 419 U. S. 1109 (1975); *Northeast Master Executive Council v. CAB*, 506 F. 2d 97 (D. C. Cir. 1974), *cert. denied*, 419 U. S. 1110 (1975).

Space Center operations unless transfers were minimized. Petitioners' Appendix at 17, 45. Furthermore, the Court of Appeals emphasized that the lack of system seniority at issue was "hardly arbitrarily disadvantageous to Space Center employees" since it provided them security from being "bumped" by system employees when the system faced its more frequent layoffs. Petitioners' Appendix at 45. Finally, the Court of Appeals reasoned that system IAM members would have had reason to complain of the pre-1970 restrictions against their transfer to the greater security available at the Space Center had the 1970 collective bargaining agreement conferred retroactive seniority on KSC employees.

There can be no basis, therefore, for holding TWA liable to the Petitioners for executing and enforcing collective bargaining agreements containing seniority distinctions which stemmed from non-arbitrary, relevant concerns. That TWA and the IAM, after extensive negotiation, were able to reach agreement in 1970 with respect to matching certain KSC job classifications with those in the rest of the system, after over five years of TWA operation of the Space Center, does not alter the fact that reasonable concerns and relevant considerations underlay the seniority distinctions agreed upon in 1964 and continued with moderate modification in 1966.

Petitioners do not take issue with the District Court's conclusion, accepted by the Court of Appeals, that TWA had no liability for whatever misrepresentations were made by Union representatives to the Space Center membership concerning the Unions' diligence in pursuing retroactive system seniority for KSC employees. That TWA never participated in nor had any knowledge of these misrepresentations is amply supported by the evidence.

Furthermore, the decision of the Court of Appeals for the Second Circuit in *Jones v. Trans World Airlines*, 495 F. 2d 490 (2d Cir. 1974), as the court below correctly concluded, is clearly distinguishable from the case at bar. Petitioners' attempt to contrive a conflict among the circuits based upon their broad brush description of the ruling in *Jones* does not merit the attention of this Court. In *Jones*, the court found that the sole basis for the seniority distinctions agreed to by the employer and the union was the union membership, or lack thereof, of the two groups of employees. As the Court of Appeals for the Second Circuit itself stated, *Jones* stands for the limited proposition that

"[d]iscrimination in seniority based on nothing else but union membership is arbitrary and invidious and violates the union's duty to represent fairly all members of the bargaining unit." 495 F. 2d at 797.

The liability of the employer in *Jones* was predicated solely on its agreement to and implementation of seniority distinctions grounded in arbitrary and invidious considerations. Where, as here, the seniority distinctions are not based upon the arbitrary ground of union membership but, rather, are based upon relevant differences between the two groups of employees, the *Jones* decision is simply not applicable. As the court below aptly concluded:

"Thus the Second Circuit's decision can give little support to the position of the Space Center employees herein, because the distinctions in seniority did not arise from non-membership in the union but instead were related to meaningful differences between the Space Center and the airline system which were reflected in TWA's policy of discouraging transfers." Petitioners' Appendix at 47.

CONCLUSION.

The findings of the District Court, affirmed by the Court of Appeals, that there was no liability of TWA for whatever misrepresentations were made by Union representatives to their members about their efforts to obtain retroactive system seniority and that the collective bargaining agreements made between TWA and the IAM did not constitute a violation of the Union's duty of fair representation were amply supported by the evidence, based upon substantial precedent and consonant with the other decisions in the courts of appeals reviewing the validity of seniority distinctions between groups of employees governed by the same contract.

For these reasons plaintiffs' petition for a writ of certiorari on the issue of TWA's liability should be denied.

Respectfully submitted,

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